U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: May 22, 1998

Case No.: **97 INA 509**

In the Matter of:

LA AGENCIA DE ORCI & ASSOCIADOS,
Employer

on behalf of

HELGA HERRERA,
Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of HELGA HERRERA ("Alien") by LA AGENCIA DE ORCI & ASSOCIADOS ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles (DOT), published by the Employment and Training Administration of the U. S. Department of Labor.

that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On January 5, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of Account Executive in the Employer's International Marketing & Advertising Agency (Hispanic Market). AF 64. The Employer described the job duties as follows:

> Develop market'g & advertis'g strategies & plans. Coordinate & supervise creative process productions& multi-media (Print, TV, Radio) Spanish language & international advertising campaigns for commercial promotion of clients products & dissemination of info. by public agencies. Negociate contracts. Apply knowledge of principles of information sciences, techniques of demographic analysis of data regard'g the culturally specific characteristics of Hispanic consumers to confer w/clients to determine advertising requirements & budgetary constraints. Prepare & present written & oral presentation to clients. Apply knowledge in adapting a product to the necessities & demands of the Hispanic market. Take into consideration import/export requirements & regulations. Directly supervise & coordinate execution of advertising campaigns with responsibility for supervision of creative staff, final editorial on Spanish language copy. & management of budgets incld'g contractual relations w/ talent, production & media suppliers. PERCENTAGE BREAKDOWN OF SPANISH LANGUAGE USED AT TIME OF WORK IS 90% of which 30% is written; 40% spoken; & 30% is reading.

AF 64. (Verbatim copy without change or correction.) The position was classified under the Occupation Title of Account Executive and Occupation Code No 164.167-010 of the Dictionary of Occupational Titles.[2]

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[2] **164.167-010 ACCOUNT EXECUTIVE** (business ser.) Plans, coordinates, and directs advertising campaign for clients of advertising agncy: Confers with client to determine advertising requirements and budgetary limitations, utilizing knowledge of product or service to be advertised, media capabilities, and audience characteristics. Confers with agency artists, copywriters, photographers, and other media-production specialists to select media to be used and to estimate costs. Submits proposed program and estimated budget to client for approval. Coordinates activities of workers engaged in marketing research, writing copy, laying out artwork, purchasing media time and space, developing special displays and promotional items, and performing other media-production activities, in order to carry out approved campaign.

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Employer's educational requirement for this job was a baccalaureate degree in International Management and Marketing. The experience required was two years in the Job Offered or as an International Marketing Executive. The Employer's Other Special Requirements were the following: Must be completely fluent in English & Spanish, experience must include advertising and "marketing, and experience must be in Latin American culture." *Id.* The Employer proposed to pay $3500 per month a forty hour week from 9:00 AM to 6:00 PM, plus time and a half for overtime. AF 06. None of the five U. S. workers who applied for the position was hired. AF 71-75.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") on October 15, 1996. AF 57-62. The CO found that the Employer failed to present persuasive evidence that U. S. workers were recruited in good faith and rejected for reasons that were solely lawful and job-related under 20 CFR §§ 656.20(c)(8), 656.21(b)(5) and (6), and 656.24(b)(2)(ii).[3] The CO said that under the Act and regulations the resumes of U. S. applicants Stanley A. Madrid and Chelika Yapa indicted that they were qualified to perform the job duties described in Employer's application for alien labor certification. AF 58-60. After comparing Mr. Madrid's resume with the Employer's job duties and the detailed comments of its recruitment report rejecting him, the CO concluded that,

> [T]his rejection appears to be based on semantics. ... Whereas the employer believes that Mr. Madrid does not have the required experience, his resume shows about six years' experience as 'Director of Marketing' which his resume describes in summary. The employer has not submitted any persuasive information to show how review of the resume was sufficient to enable the employer to conclude that this experience [did not meet] the employer's requirement for 2 years' experience as an account executive.

The CO added,

> Moreover, concerning the degree major requirement and the experience requirement, it does not appear that the alien beneficiary of this application meets either, which is discussed in the next finding below. Where an employer has rejected a U. S. worker for allegedly lacking requirements that the alien beneficiary also lacks, there is an appearance that the job is not truly open to U. S. workers.
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> Next, the employer did not actually list a special requirement for experience in 'contract negotiating' in item 15 of the 750 A form. Therefore, the employer cannot reject a U. S. worker who lacks that experience. However, nevertheless, are not persuaded that this

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[3] 20 CFR § 656.20(c)(8) requires that the job offered be "clearly open" to any qualified U. S. worker. 20 CFR § 656.21(b)(2)(ii) provides that a U. S. worker is considered able and qualified for the job if the worker's education, training, experience, or a combination of these factors enables the worker to perform in a normally acceptable manner the duties of the occupation as it customarily is performed by other workers similarly employed. In addition the CO added that 20 CFR § 656.21(b)(6) provides that U. S. workers who apply for a position offered to the alien may only be rejected for reasons that are lawful and job related.

> applicant has no experience with advertising contract, based upon his experience as a marketing director and the fact that not all facts of experience are necessarily listed on a resume.

AF 59-60. The CO then observed that Ms. Yapa was not interviewed and, after reviewing similar records relating to her application for the job, the CO said as to both Mr. Madrid and Ms. Yapa, "Where the employer has rejected the applicants based on resume review alone, the employer should have interviewed them. Mr. Madrid is considered resume qualified, and it appears that there is a reasonable probability that Ms. Yapa may be qualified. In failing to attempt to recruit these applicants the employer has not only failed to document job related reasons for the rejections, but the employer has also created an appearance that the job is not truly open." AF 60. Because these two job applicants were qualified by their resumes, the CO said, this application did not comply with 20 CFR §§ 656.20(c)(8), 656.21(b)(2)(ii), and 656.21(b)(6). The CO instructed the Employer to refute these findings under these regulations by way of rebuttal.

Addressing the Alien's qualifications, the CO said her application on Form ETA 750 B did not qualify her for the job that Employer offered because she had less than three years of experience as an international marketing executive. Moreover, because Alien's baccalaureate degree was in industrial engineering her academic training in international business could not qualify her for this job, as the Western Association of Schools and Colleges had indicated that the American Graduate School of International Management of Glendale, California, the school that awarded her master's degree, was not accredited.[4] AF 61. On the basis of this evidence the CO directed the Employer to show that the job requirement in its application on Form ETA 750 A represented its actual minimum requirements for the position and other evidence under 20 CFR § 656.21 (b)(5).[5]

Rebuttal. Employer's December 27, 1996, rebuttal addressed the issues stated in the NOF. AF 35-53. The Employer argued that the resumes of Mr. Madrid and Ms. Yapa did not qualify them for this position by training, education, experience or other preparation in International Marketing, which the Employer identified as a "specific requirement of the position offered." AF 36. Employer also offered evidence of a telephone interview with Mr.Madrid after the NOF was issued, which it claimed confirmed its prior decision to reject him; and it reiterated its assertion that Ms. Yapa's lack of qualifications did not entitle her to an interview. AF 37-38.

By attaching the transcript of the Alien's record at the American Graduate School of Intenational Management, excerpts from the 1995-6 edition of the American Council on Education "Accredited Institutions of Postsecondary Programs Candidates," and an excerpt from

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[4]This school apparently is connected with Thunderbird College, which is located in Arizona. AF 36.

[5]It is fundamental that 20 CFR § 656.21(b)(5) requires an employer to establish that its job qualifications for the position offered are its actual minimum requirements for the job, that it has not in the past hired workers with less training or experience to perform work similar to duties of the position at issue, and that it is not feasible to hire workers with less training or experience than is normally required by the job it now seeks to fill.

a 1996-1998 report of the American Association of Collegiate Registrars and Admissions Officers, the Employer's rebuttal offered evidence that the Alien graduated from the American Graduate School of International Management and that this school is adequately accredited for the purposes of this proceeding. AF 42-46.

Final Determination. The CO denied certification in the Final Determination issued on February 11, 1997, explaining that the Employer failed to sustain its burden of proof in that it failed to document job related reasons for rejecting a U. S. worker, citing 20 CFR §§ 656.20(c)(8) and 656.21(b)(6). The CO also said that the Employer failed to provide its true minimum requirements for this position under 20 CFR § 656.21(b)(2).[6]

Noting the accreditation evidence filed by the Employer, the CO said the rebuttal did not include an amendment to the ETA 750 B or include a direct statement that the Alien had attended the accredited Arizona school. The CO observed, moreover, that the Employer had amended the Form ETA 750 A by changing the experience and education requirements and that it agreed to retest the labor market under the amended version of its hiring criteria.

Addressing Employer's rebuttal argument concerning the qualifications of Mr. Madrid, the CO said the rebuttal was not persuasive in that it failed to overcome the NOF finding that its rejection of him based on the review of his resume "appeared based on semantics." The evidence, said the CO, was not a verbatim account of the interview, but a list of "negative conclusions" that failed to meet the standard established by BALCA precedent and offered no discussion of this candidate's publication that apparently related to international advertising. As a result, the Employer's evidence of a post NOF interview failed to remedy its rejection of this candidate, and its account of the interview was not sufficient for the reasons given in the NOF. Consequently, the CO denied certification on grounds that the Employer did not establish that Mr. Madrid was rejected for job-related reasons or that this job was truly open to qualified U. S. workers.

Appeal. On February 28, 1987, the Employer moved for review of the denial of this application for alien labor certification and filed a brief. AF 01-08.

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, its recruitment for the position it describes in the application for alien labor certification must conform to the Act and regulations.

After reviewing the NOF and the rebuttal evidence as to accreditation, the panel finds that the Employer's rebuttal evidence was sufficient to respond to the NOF finding. While the CO's

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[6]Unless demonstrated to arise from business necessity, 20 CFR § 656.21(b)(2) requires the Employer to establish that its hiring criteria for this position are the normal requirements for its performance in the United States and are encompassed by the description of the job in the Dictionary of Occupational Titles.

comment that the rebuttal did not include an amendment to the ETA 750 B or include a direct statement that the Alien had attended an accredited school is factual, the Employer's failure to comply with the added details of form is not related to the substance of the Act and regulations. Consequently, we cannot affirm the denial of certification for any reason connected with this issue.

While the Employer is entitled to adopt any qualifications it may fancy for the workers it hires in the ordinary conduct of its business, its hiring criteria are necessarily limited by the Act and regulations when it undertakes test the labor market in pursuing its application for alien labor certification, and the Employer's conclusion that Mr. Madrid was not qualified for this job requires close examination. In this case, the central issue in the implementation of 20 CFR § 656.21(b)(7) is whether qualifications of the U. S. worker, Mr. Madrid, meets the minimum requirements of the Account Executive position in the context of Employer's business. The job description in the Employer's Form ETA 750 A, the NOF, the Employer's rebuttal, and the occupation description in the DOT have been compared with each other to determine just what hiring criteria the U. S. workers should have been required to meet. Because 20 CFR § 656.21(b)(5) limited Employer's hiring criteria to its actual minimum requirements for the job.

As the CO found Mr. Madrid qualified as an Account Executive under the Act and regulations, this appeal turns on whether the panel finds the evidence of record sufficient to support the CO's conclusion. Upon comparing the DOT description of this occupation with the Employer's delineation of the job to be performed in the Form ETA 750 A, *supra*, the panel observes that the two are essentially similar. Except for its requirement of fluency in the Spanish language, which is not at issue, any deviations of the job description in the Form ETA 750 A from the DOT did not alter the hiring criteria, but simply added emphasis to various subordinate job components and functions within the context of the entire package of duties to be performed by an Account Executive in Employer's organization.

First, the requirement of fluency in Spanish was not challenged by the CO and was clearly a qualification for this job for reasons that were stated in the Form ETA 750 A that the Employer filed. The Employer admitted that Mr. Madrid was fluent in Spanish, but ultimately said his fluency was not good enough for this job. This reason for rejecting Mr. Madrid is not acceptable. (1) Neither the Form ETA 750A nor the advertisement of the position disclosed that the Employer required a superior level of fluency for the performance of this job. (2) The Employer's determination of the job applicants success or failure in a "test" Employer claims to have administered was based entirely on the basis of its subjective judgement as to the unknown response of the Mr. Madrid to a test whose content was unknown and whose answers were not based on any criterion that is known to the record.
(3) The Employer's finding that the U. S. worker's facility in Spanish was inadequate occurred in the course of the post NOF telephone interview and long after the worker was initially rejected for the same reason without an interview. As such its weight as documentation of Employer's rejection of this job applicant under 20 CFR § 656.21(b)(7) is minimal.

Second, the Employer's rejection of Mr. Madrid for reasons related to his education and experience placed its emphasis on the contents of his resume, which showed about six years' experience as "Director of Marketing," as the Employer contended that this experience did not equal its hiring criterion of two years' experience as an Account Executive. The Employer's reasons for its rejection of Mr. Madrid were stated in its letter of August 23, 1995, in which it said his experience and knowledge did not appear to meet the minimum requirements for the position of Account Executive. AF 259. In its rebuttal, however, the Employer relied on the argument that its agency was involved in "international marketing," for which, it said, specialized experience was required. AF 36. "The duties of a Marketing Director might appear to be similar to those of the position offered, but they are not the same," the Employer said. It then acknowledged Mr. Madrid's educational qualifications in the Master's degree in Communications with a concentration in Advertising from the California State University at Fullerton, which it compared with the Alien's substantial background in international marketing.

The Employer's Form ETA 750 A job description referred to this position as an Account Executive, describing its business as international marketing and advertising in the Hispanic market, however. See December 15, 1994, cover letter and attachments at AF 64, 69-70. While its educational requirement for this job was a baccalaureate degree in International Management and Marketing, the experience required was two years in the Job Offered as an Account Executive or in the Related Occupation of International Marketing Executive. In the NOF the CO addressed the apparent narrowness of the degree that the Employer specified and did not accept the Employer's assumption that Mr. Madrid's six years of experience did not meet its criterion of two years in the Job Offered. AF 59.

These circumstances have been examined in the context of the Alien's educational qualifications. While the Employer required a baccalaureate degree in International Management and Marketing, the Alien earned her degree as a Bachelor of Science in industrial engineering in 1988. Despite the absence of any qualification of education, training or experience in international marketing, the Alien was hired and worked as an "International Marketing Executive" in Bolivia from March 1989 until July 1991. In September 1991 the Alien first studied international management in the United States, where she graduated with a master's degree in December of 1992, having worked in the Job Offered from September to December 1992. From January to October 1993 the Alien was an Assistant Account Executive for the Employer, and she worked as an account executive for the Employer from November 1993 to December 1994. The Alien's own qualifications for the Job Offered were made an issue under 20 CFR § 656.21(b)(5).

As the NOF failed to note that the Alien's experience was acquired while working for the Employer, no other experience is possible, since the Alien's entire career and education is covered by her admissions in the Form ETA 750 B filed to offer factual representations and admissions in her behalf in this application. AF 59, 61, 309-311. The rebuttal incorporated the NOF and indicated the Employer's awareness of all issues discussed. AF 29-34. The Employer acknowledged the incongruity of its educational requirement in the amendment to the Form ETA 750 A by which it proposed to change the required academic qualification from a baccalaureate

degree in International Management and Marketing to a Master's degree in that field. AF 39.

Based on the evidence described above, the undisputed evidence of record clearly established that the only experience that the Alien had in the position at issue was with the Employer and that the Employer hired the Alien with less than the experience it required of U. S. workers who applied for this job. **Charley Brown's**, 90 INA 345 (Sep. 17, 1991). As the Board has pointed out, an employer may not require more experience of U. S. workers than the alien possesses. **Western Overseas Trade and Development Corp.**, 87 INA 640 (Jan. 27, 1988).[7] The Employer's hiring criteria were not established as its actual minimum requirements, as this Alien did not possess the necessary experience before she was hired by the Employer. **Super Seal Manufacturing Co.**, 88 INA 417 (Apr. 12, 1989)(*en banc*); and see also **Bear Stearns & Co., Inc.**, 88 INA 427 (Jul. 29, 1989). It follows that the Employer has failed to establish under 20 CFR § 656.21(b)(5) that it has not demanded of the U.made S. worker more stringent qualifications than it required in hiring the Alien for this job. **ERF Inc., d/b/a Bayside Motor Inc**., 89 INA 105 (Feb. 14, 1990).

As the panel finds that the evidence of record supported the denial of certification, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals

[7] Moreover, it is inferred from Employer's proposed amendment that the hiring criteria were shaped to fit the Alien's qualifications. Compare **Metal Cutting Corp.**, 89 INA 090 (Jan. 8, 1990).

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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.